No. 83-1520

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Petitioner,

—*vs.*—

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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Statement of Affiliates and Subsidiaries

1. Continental Conair Ltd .(Hong Kong)
2. Continental Electric Industries, Inc. (Hong Kong)
3. Continental Gourmet, Inc. (Edison, New Jersey)
4. Continental International Corp. (Edison, New Jersey)
5. Tatung-Conair Corp. (Taipei, Taiwan)
6. Zotos International Inc. (Darien, Connecticut)
7. Conair Consumer Products, Inc. (Canada)

Questions Presented

1. Whether the decision of the United States Court of Appeals for the District of Columbia Circuit, refusing to enforce the National Labor Relations Board's issuance of a nonmajority bargaining order, is inconsistent with this Court's decision in *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969) and the provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("Act").

2. Whether the decision of the United States Court of Appeals for the District of Columbia Circuit, refusing to enforce the National Labor Relations Board's issuance of a nonmajority bargaining order, places undue retrictions on the remedial authority of the Board.

3. Whether a conflict between two Circuit Courts of Appeal, alone, mandates that this Court grant a petition for a writ of certiorari.

TABLE OF CONTENTS

	PAGE
STATEMENT OF AFFILIATES AND SUBSIDIARIES	i
QUESTIONS PRESENTED	ii
TABLE OF CASES AND AUTHORITIES	v
PRELIMINARY STATEMENT	1
COUNTER-STATEMENT OF THE CASE AND FACTS	2
A. Counter-Statement of the Case	2
B. Counter-Statement of the Facts	3
REASONS FOR DENYING THE PETITION:	
Point I—The decision below is not inconsistent with this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969)	7
A. Gissel does not approve nonmajority bargaining orders	7
B. The Board has failed to make the necessary showing as to why a bargaining order is the appropriate remedy	16
Point II—The decision below does not place undue restrictions on the remedial authority of the NLRB	17
Point III—Although the decision below conflicts with the decision of United States Court of Appeals for the Third Circuit in *United Dairy Farmers Cooperative Assn.* v. *NLRB*, 633 F. 2d 1054 (3d Cir. 1980) that alone is not sufficient grounds for this Court to grant certiorari	19

PAGE

Point IV—This Court should not grant certiorari, because in *Gourmet Foods Inc.*, 270 NLRB No. 113 (May 18, 1984), the NLRB held that it does not have the statutory authority to issue a nonmajority bargaining order 21

CONCLUSION 22

PAGE

Table of Authorities

Cases Cited

California Dept. of Industrial Relations v. Homemakers Inc., 423 U.S. 1063 (1976) 20

Dupuy v. Dupuy, 434 U.S. 911 (1977) 21

Fields Productions Inc. v. United Artists Corp., 432 F.2d 1010 (2d Cir. 1970), *cert. denied,* 401 U.S. 949 (1971) 20

Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944) 13, 14

Freeman Guardian et al. v. Flake, et al., 405 U.S. 1032 (1972) 20, 21

General Steel Products Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968) 7

Gourmet Foods, Inc., 270 NLRB No. 113 (May 18, 1984) 17, 21

H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) 17

International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961) 14, 15

Muley v. Samuel Goldwyn Productions, 433 F.2d 1073, *cert. denied,* 402 U.S. 923 (1971) 20

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) 18

NLRB v. Gissel Packing Co. Inc., 395 U.S. 575 (1969), *rehearing denied,* 395 U.S. 869 (1969) .....ii, 7-11, 13-15

NLRB v. Heck's Inc., 398 F.2d 337 (4th Cir. 1968) .. 7, 9

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 18

PAGE

NLRB v. K&K Gourmet Meats, Inc., 640 F.2d 460 (3d Cir. 1981) 20

NLRB v. Logan Packing Co., 386 F.2d 652 (4th Cir. 1967) 9

NLRB v. Pace Oldsmobile Inc., 681 F.2d 99 (2d Cir. 1982) 16

NLRB v. Sinclair Refining Co., 397 F.2d 157 (1st Cir. 1968) 7, 15

NLRB v. Western Drug, 600 F.2d 1325 (9th Cir. 1979) 16

Peoples Gas System Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980) 16

United Dairy Farmers Co-Op Assn. v. NLRB, 633 F.2d 1054 (3d Cir. 1980) 11, 19, 21

Woodkraft Division, Georgia Kraft Company v. NLRB, No. 83-103, —— U.S. ——, 80 L.Ed.2d 149, 115 LRRM 3296 (1984) 21

Statutes Cited

National Labor Relations Act of 1947, 29 U.S.C. Sec. 151 *et seq.* ii

Sec. 7, 29 U.S.C. Sec. 157 14

Sec. 9(a) 29 U.S.C. Sec. 159 14

Sec. 10(c) 29 U.S.C. Sec. 160 ..... 17, 18

Regulation Cited

Rules of the Supreme Court of the United States Rule 17.1 ..... 19, 21

PAGE

Other Authorities Cited

79 Cong. Rec. 7671 (1935) 17

Bok, "The Regulation of Campaign Tactics in Representation Elections Under the NLRA," 78 Harv. L. Rev. 38 (1964) 9

Spelfogel, "Employee Representation in Investigative Interviews, Pre-election Propaganda and Non-majority Bargaining Orders, Some Current 'Hot' Issues under the NLRA," 30 Federal Bar News and Journal 448 (Nov. 1983) 9

Stern & Gressman, Supreme Court Practice, Sec. 4.1 at 269 (5th ed. 1978) 20

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BRIEF IN OPPOSITION

Preliminary Statement

Respondent, Conair Corporation ("Company"), pursuant to Rule 22.1 of the Rules of this Court, submits this Brief in Opposition to the Petition for a Writ of Certiorari of Local 222 International Ladies' Garment Workers' Union,

A.F.L.-C.I.O. ("Union"), respectfully urging this Court to decline to review the decision of the United States Court of Appeals for the District of Columbia Circuit ("Circuit Court") and showing:

Counter-Statement of the Case and Facts

a. Counter-Statement of the Case.

This Petition for a Writ of Certiorari arises out of six unfair labor practice charges and a representation petition filed with Region 22 of the National Labor Relations Board ("Board"), against the Company by the Union.[1] On March 8, 1978, after conducting an investigation, the Regional Director of the Board issued a consolidated complaint.[2] On March 23, 1978, hearings were commenced before Administrative Law Judge Jesse Kleiman ("ALJ"), which continued through June, 1978.

On July 30, 1980, more than two years after the close of hearings, the ALJ issued his decision. In his decision, the ALJ found that the Company committed "outrageous and pervasive" unfair labor practices, and ordered the Company to take affirmative steps to remedy them. The Order of the ALJ also contained several extraordinary remedies including: among others, the providing to the union of access to the Company's premises, the placing of newspaper ads, and a personal presidential reading order. However, because the Union failed to demonstrate that it represented a majority of the unit's employees, the ALJ refused to issue a bargaining order.

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[1] Case Nos. 22-CA-7586, 22-CA-7672, 22-CA-7939, 22-CA-8173, 22-CA-8220, 22-CA-8238, and 22-RC-7119.

[2] There were two earlier complaints which were consolidated in the March 8, 1978 Order.

All parties excepted to the ALJ's Decision and on May 28, 1982, over five years after the first charges were filed, the Board issued its Decision and Order.[3] The Board Decision affirmed all the unfair labor practice and remedial findings of the ALJ, but reversed his determination regarding the nonmajority bargaining order and directed the Company to bargain with the Union. Two members of the Board dissented.

The Company petitioned the Circuit Court to review the Order of the Board. The Board filed a cross-petition to enforce its Order and the Union was granted permission to intervene.

On November 15, 1983, the Circuit Court rendered its Decision enforcing in part and vacating in part the Decision and Order of the Board. Of paramount significance, the Court rejected the Board's imposition of a nonmajority bargaining order:

> "On the central issue, we hold that Congress has not empowered the Board to issue a bargaining order absent a concrete manifestation of majority employee assent to union representation." (at 4a)*

b. Counter-Statement of the Facts.[4]

The Company is engaged in the manufacture, sale and

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* a—following a page number are references to the appendix filed with the Petition.

[3] The Board issued a Supplemental Order on June 3, 1982.

[4] The facts of this case are extraordinarily lengthy. The transcript of hearings exceeded twenty thousand pages. Therefore in an effort not to burden the Court, the Company submits a digest of the facts. The facts are set out in detail in the opinion of the Circuit Court (5a-18a).

distribution of hair care, personal grooming, and related products. During this proceeding, the Company maintained administrative offices, conducted warehousing and distribution operations and produced electrical hair care appliances at its facility located in Edison, New Jersey. The Company employed 300 unit workers at Edison, who engaged in production, maintenance, warehousing, shipping, receiving, janitorial and truck driving work.

In March 1977, the Union began an organizational campaign at the Company's Edison facility. In early April, after becoming aware of the Union's campaign, the Company commenced a series of management-employee meetings. At the first of these meetings on April 4, 1977, two executives of the Company spoke to employees, advised them that the Company was aware of the Union's organizing campaign, pointed out benefits presently provided by the Company and cautioned employees, that certain of these benefits might be lost with unionization. At this meeting, the Company also stated that it was planning to adopt changes that would alleviate many employee complaints. On April 6, Conair's President and other executives, met with employees on two occasions. At the first meeting, the President addressed a mass meeting of unit employees in the production area. His remarks tracked earlier remarks made at the April 4 meeting. Later that day, he, along with other executives, met with small groups of unit employees. At these meetings, the Company representatives voiced their opposition to unionization, and re-emphasized the nature and extent of existing benefits provided by the Company.[5]

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[5] The ALJ, the Board and the Circuit Court all held that certain statements made at these meetings violated the Act.

On April 11, 1977, the Union struck.[6] Approximately 125 to 140 unit employees participated in the strike. The strike was marked by substantial union violence. This resulted in the Company securing several injunction and contempt orders against the Union in the Superior Court of the State of New Jersey. The strike ended on September 23, 1977.

During the strike, the Company sent each striker two letters in English and Spanish. The first one dated April 20, 1977 advised employees that they must report to work on April 22, or be deemed to have quit their jobs.[7] The second dated June 9, 1977 rescinded the first, and offered all employees full and immediate reinstatement to their jobs.

On September 23, 1977, the strikers made unconditional offers to return to work. The Company accepted, but did not reinstate the strikers immediately. Instead, as was normal procedure, it required the strikers to complete new job application, insurance and tax forms. From October 4, 1977 through November 7, 1977, most of the strikers were reinstated.[8]

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[6] The ALJ, the Board and the Circuit Court all found this to be an unfair labor practice strike.

[7] The ALJ found the first letter to be a "threat of discharge." However, the Board, without a hearing, reversed this finding and held the letter was an actual discharge in violation of the Act. Because the Company was not provided adequate notice to litigate the April letter as an actual discharge, the Circuit Court reversed the Board's determination (23a-24a).

[8] The Company refused to reinstate several strikers who plead guilty to picket line misconduct. The Circuit Court held that this violated the Act.

On April 13, 1977 the Union petitioned the Board for certification and based on the April meetings, filed unfair labor practice charges against the Company. The Company and Union then entered into a stipulation for a consent election. The election was originally scheduled for May 6, but was postponed, because, on April 25, 1977 the Company filed unfair labor practice charges against the Union alleging picket line misconduct.

On November 23, 1977, the Board approved a Formal Settlement of unfair labor practice charges filed by the Company against the Union.[9] The election was eventually rescheduled for December 7, 1977, a date within the unions 60-day posting period. By scheduling the election during this time, the Board violated its own rules and regulations (see 19a-20a, fns. 48 and 49).

In the two weeks prior to the election, meetings were held between supervisors and employees in which employees were urged to vote "no union."[10] The Union lost the election held on December 7, by a vote of 136 to 69.[11]

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[9] The Union agreed to cease and desist from picket line violence and post a notice (for sixty days) stating that it would refrain from violating the Act.

[10] The ALJ, the Board and Circuit Court held that during the campaign, certain of the supervisors' actions, i.e., threatening plant closure and distributing literature which threatened reprisal and promised benefits for a pro company vote and the Company's earlier behavior at the April meetings, along with the letters and the installation of new benefits, such as the hiring of a bilingual personnel manager, were "outrageous and pervasive" unfair labor practices. As set forth above, because the union never secured majority support from the affected employees, the ALJ refused to issue a bargaining under. However he did order other extraordinary remedies to rectify the situation. The Board upheld the other extraordinary remedies but also imposed a nonmajority bargaining order. The Circuit Court refused to enforce the latter portion of the Board order.

[11] An intervening Teamsters union received eight votes.

Throughout the entire lifespan of this proceeding, the Union never secured a majority of authorization cards from the unit's employees.[12]

REASONS FOR DENYING THE PETITION

POINT I

The decision below is not inconsistent with this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

A. Gissel does not approve nonmajority bargaining orders.

In its petition (pp. 14-16), the Union urges this Court to grant certiorari because the Circuit Court's refusal to enforce the Board's nonmjority bargaining order conflets with this Court's mandate in *NLRB* v. *Gissel Packing Co., supra* ("Gissel"). The Union contends that in *Gissel* this Court held that the Board had authority to order an employer to bargain with a union despite the absence of tangible evidence that the union ever secured support from the majority of affected employees.

This contention is erroneous. Neither in *Gissel,* nor in any other case, has this Court sanctioned the imposition of nonmajority bargaining orders.

In *Gissel,* the Court consolidated four cases for decision.[13] The common ground in each case was that the

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[12] The best the Union could do was obtain cards from 46% of the unit employees.

[13] *NLRB* v. *Gissel Packing Co.*, 398 F.2d 336 (4th Cir. 1968); *NLRB* v. *Hecks, Inc.*, 398 F.2d 337 (4th Cir. 1968); *General Steel Products Inc.* v. *NLRB*, 398 F.2d 339 (4th Cir. 1968); *NLRB* v. *Sinclair Refining Co.*, 397 F.2d 157 (1st Cir. 1968).

Union seeking representation had at one time achieved a majority showing from the unit of employees it sought to represent, but, because of serious employer misconduct, the support had dissipated. Chief Justice Warren described the only questions before the *Gissel* Court:

> "whether union authorization cards, *if obtained from a majority of employees* without misrepresentation or coercion, are reliable enough generally to provide a *valid, alternate route to majority status;* whether a bargaining order is an appropriate and authorized remedy where an employer rejects a *card majority while at the same time committing unfair labor practices that tend to undermine the Union's majority and make a fair election an unlikely possibility.*" (at 579) (emphasis supplied)

The Court held that (1) authorization cards were a valid indicator of majority support, (2) an election was not a union's only reliable means of demonstrating majority status and (3) the duty to bargain under § 8(a)(5) of the Act could be imposed in situations where employee majority sentiment for a union, once expressed, had been dissipated by serious employer misconduct. (at 614)

The Court described three categories of cases when the imposition of a bargaining order might be justified. Significantly, in all three, the Union had obtained a majority showing from interested employees.

In the first category, the Union majority was destroyed because of "outrageous and pervasive" employer unfair labor practices. Under those "exceptional circumstances," the Court recognized that a bargaining order would be justified without the need to evaluate if a fair election could be held. In the second category, the Union majority was dissipated through a lesser degree of, but still "seri-

ous" unfair labor practices. The Court held that, in this category a careful evaluation was required as to whether a fair election could be held. If upon careful evaluation the Board concluded that the employer's behavior had created an atmosphere where a fair election could not be held, a bargaining order would be the appropriate remedy. The third category consisted of circumstances where, after analysis, it was found that the employer's unfair labor practices were not of such a serious nature as to foreclose the holding of a fair election. Here, the Court held, an election and not a bargainnig order was always the proper remedy.

The core issue of the present case arises as a result of the *Gissel* Court's perusal of dictum which appears in two opinions from the Fourth Circuit. See *NLRB* v. *Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967), and *NLRB* v. *Heck's Inc., supra.* The Fourth Circuit suggested that in category one situations, where an employer committed "outrageous and pervasive" unfair labor practices, the Board could issue a bargaining order without the need of inquiry into the union's majority status.[14] The *Gissel* Court reciting this dictum, stated (in dictum of its own):

> "Before considering whether the bargaining orders were appropriately entered in these cases, we should summarize the factors that go into such a de-

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[14] The basis for the Fourth Circuit's dictum was a law review article by then Harvard law Professor Derek Bok. However, as noted by a recent commentator, the Board's decision in the present case ignores the limitations and protections recommended by Professor Bok. See Bok, "The Regulation of Campaign Tactics in Representation Elections Under the NLRA," 78 Harv. L. Rev. 38 (1964); Spelfogel "Employee Representation in Investigative Interviews, Pre-election Propaganda and Nonmajority Bargaining Orders Some Current 'Hot' Issues under the NLRA," 30 Federal Bar News and Journal 448 (November 1983).

> termination. Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional cases' marked by 'outrageous and pervasive' unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair, and reliable election cannot be had . . . The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices." (at 613-614) (citations omitted).

The Union argues that through this dictum, the *Gissel Court* approved the imposition of bargaining orders in circumstances in which the Union never demonstrated majority support.[15]

The Union's argument is misplaced. A close analysis of this portion of the opinion demonstrates that the *Gissel* Court did not state that in exceptional cases a nonmajority

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[15] Until the present case, the full Board only ordered bargaining orders in cases where the Union had demonstrated majority support.

bargaining order was warranted, rather, it merely repeated the comments of the Fourth Circuit. In fact, in the very next paragraph of the *Gissel* decision, the Court held:

> "The *only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process.* The Board's authority to issue such an order on a lesser showing of employer misconduct is appropropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case of course, *effectuating ascertainable employee free choice becomes as important a goal as deterring employer behavior.*" (at 614) (emphasis supplied)

In *United Dairy Farmers Co-op. Assn.* v. *NLRB*, 633 F. 2d 1054 (3d Cir. 1980), the principal decision relied on by the Union, the United States Court of Appeals for the Third Circuit confirmed this view. In that opinion, the Court held that the issue of whether the Board had the authority to issue nonmajority bargaining orders was not reached by the *Gissel* Court.

> "Thus in reviewing its decision, we are presented with an *issue commented on in dictum by the Supreme Court in NLRB* v. *Gissel, . . . but not specifically reached*: whether and under what circumstances the Board has remedial authority to order an employer who has committed unfair labor practices to bargain with a union that has never won a certification election or secured a card majority." (at 1056) (emphasis supplied)

A plausible explaination of what the *Gissel* Court meant by its controversal dictum was set forth in the Circuit Court's decision:

"The Supreme Court's reference in *Gissel* to the possibility of Board-imposed bargaining orders 'without need of inquiry into majority status' perhaps has been read to indicate more than the Court intended. Prior to its reference to the Fourth Circuit's *Logan Packing* dictum, the Supreme Court had set out its reasons for disagreeing with the Fourth Circuit's approach 'on all major issues,' 395 U.S. at 613, including that Circuit's distrust of union authorization cards, its view that the 1947 Taft-Hartley amendments had ruled out bargaining orders on the basis of card majorities, and its refusal to accept the Board's *Cumberland Shoe* doctrine. *Id.* at 595-610. The Court then softened its multiple rejections of Fourth Circuit positions by pointing out that the Circuit had 'left open the possibility' of issuing bargaining orders without inquiry into majority status in sufficiently egregious cases. *Id.* at 613; see *Logan Packing*, 386 F.2d at 570 (Board 'may have the power' to impose a bargaining order as a remedy for egregious unfair labor practices).

Because *Logan Packing*, in dictum, had raised the possibility of Board-imposed bargaining orders in 'exceptional cases' marked by 'outrageous and pervasive' unfair labor practices, the Supreme Court in *Gissel* was able to say that 'the actual area of disagreement between our position here and that of the Fourth Circuit is not large.' *Gissel*, 395 U.S. at 613. Thus, the High Court's concentration apparently was on the quality of employer conduct *Logan Packing* indicated might justify a bargaining order, not on the notion that such an order could issue 'without need of inquiry into majority status.

> The probability that the High Court referred *casually* to dispensing with inquiry into majority status is heightened by the statement the Court made immediately after it set out the *Logan Packing* dictum:
>
> The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.
>
> *Gissel*, 395 U.S. at 614. The Court cited two cases as illustrative of the Board's policy: *United Steel-Workers of America* v. *NLRB*, 376 F.2d 770 (D.C. Cir. 1967), and *J.C. Penney Co.* v. *NLRB*, 384 F.2d 479 485-86 (10th Cir. 1967). Both involved employer misconduct designed to destroy the union's card majority." (47a fn 83) (emphasis supplied)

The Union also asserts that Gissel recognized that nonmajority bargaining orders do not prejudice employees Section 7 rights (see Petition, pp. 12-13). In support of this argument, the Union relies on this Court's decision in *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944) ("Franks Bros."). This reliance is specious.

In *Franks Bros.*, the Court held that an employer was required to bargain with a union that at one time represented a majority of employees, but lost that majority due to the employer's subsequent unlawful action.

A close study of that decision demonstrates that it is fully consistent with *Gissel*. In both cases, this Court held that bargaining orders were appropriate remedies, when the record proved *that at one time the union represented a majority of employees*, but that majority status had been erroded because of unlawful employer conduct.

The seminal issue in the present case is entirely different from both *Gissel* and *Franks Bros.* The result the Union seeks here would not return conditions to the *status quo,* the goal accomplished by the *Franks Bros.* and *Gissel* decisions. Rather it would impose upon employees of the Company a union that they never chose. Such a result is prohibited by both directives of this Court and the Act itself.

A review of the relevant provisions of the Act and this Court's decision in *International Ladies' Garment Workers' Union* v. *NLRB,* 366 U.S. 731 (1961) demonstrates that the Board may only require employers to bargain with representatives designated by a majority of employees.

Section 7 of the Act states:

> "Employees shall have the right to self orgainization, to form, join or assist labor organizations, to bargain collectively *through representatives of their own choosing,* and to engage in other concerted activities for the purpose of collective brgaining or other mutual aid or protection, and *shall also have the right to refrain from any or all such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by §8(a)(3)." (emphasis supplied)

Section 9(a) of the Act reads in part:

> "Representatives designated or selected for the purposes of *collective bargaining by a majority of the employees in such unit* shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment."

In *International Ladies Garment Workers Union* v. *NLRB, supra,* this Court concluded that it was an unfair labor practice for an employer to bargain with a Union that never demonstrated it represented a majority of affected employees:

> "[The employer] granted exclusive bargaining status to an agency selected by a *minority of its employees,* thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgement of § 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity. It follows without need of further demonstration, that the employer activity found present here violated § 8(a)(1) of the Act which prohibits employer interference with, and restraint of employee exercise of § 7 rights." (at 737-738, footnote omitted) (emphasis supplied)

Finally, the Union's attempt to portray this Court's discussion of the Fourth Circuit's *Sinclair* decision as warranting nonmajority bargaining orders is factually erroneous and inconsistent with the holding of that case. (See Petition pp. 13-14).

There is nothing in *Gissel* which either classifies *Sinclair* as a category one case nor justifies the imposition of nonmajority bargaining orders. *Sinclair* stands only for the proposition that a union which had at one time garnered majority support, that was dissipated due to serious employer misconduct may be entitled to a bargaining order, only if upon analysis it is determined that a fair election could not be held and conditions could not be returned to the status quo.

B. The Board has failed to make the necessary showing as to why a bargaining order is the appropriate remedy.

In addition to the fact that a bargaining order is inappropriate in this case due to the failure of the Union to achieve a majority showing, there are several other reasons why the bargaining order imposed by the Board was not warranted. Simply stated, the Board failed to provide a reasonable analysis and articulation of reasons why a bargaining order was necessary and why a fair election could not be held today.

Recent case law throughout the Circuit Courts has uniformly criticized the Board for its failure, as here, to provide an analysis, reviewing changes in circumstances such as employee turnover, passage of time, the installation of new management, and other mitigating circumstances prior to issuing a bargaining order. See, *NLRB* v. *Pace Oldsmobile Inc.*, 681 F.2d 99 (2d Cir. 1983), *Peoples Gas System Inc.* v. *NLRB*, 629 F.2d 35 (D.C. Cir. 1980); *NLRB* v. *Western Drug*, 600 F.2d 1325 (9th Cir. 1979). In the present case, the Board failed to make any analysis or findings regarding these factors. We submit that absent such an analysis by the Board, the Circuit Court's decision must stand on that ground alone and the Petition for Certiorari must be rejected.

POINT II

The decision below does not place undue restrictions on the remedial authority of the NLRB.

In its Petition (pp. 16-18), the Union contends that the Circuit Court's refusal to enforce the Board's nonmajority bargaining order places severe restrictions on the remedial authority of the Board to administer the statute effectively. Yet, nothing in the Act authorizes the Board to impose nonmajority bargaining orders as a remedy for unlawful employer behavior and the Board itself now realizes that it does not have the statutory authority to impose this remedy. *Gourmet Foods, Inc.,* 270 NLRB No. 113 (May 18, 1984).

> ". . . We conclude that nonmajority bargaining orders are not within our remedial discretion." (at 22)

In *H.K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970), this Court described the limitations of the Board's remedial authority. The Court held that Section 10(c) of the Act provides that the Board may impose only such remedies as will effectuate the policies of the Act (at 108). A nonmajority bargaining order is a remedy that does not effectuate the policies of the Act. This is because the Act is based on the corner-stone principle of majority rule. As Senator Wagner, the chief sponsor of the Act, articulated:

> "Democracy in industry must be based upon the same principle as democracy in government. *Majority rule, with all its imperfections, is the best protection of workers' rights,* just as it is the surest guarantee of political liberty that mankind has yet discovered." 79 Cong. Rec. 7671 (1935). emphasis supplied)

From the inception of the Act, this Court has recognized that its fundamental purpose was to safeguard employee rights to self-organization and to promote the achievement of industrial peace through the election of majority representatives of the employee's own choosing *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). A union chosen, not by the employees themselves but on speculation by "big brother NLRB" (46a) does not in any way further this basic purpose.

NLRB Member Hunter, commenting on this intrusion, stated:

> "When all is said and done, it is the particular employees involved here who will have to live with the Boards selection of a bargaining representative for them. And this selection has been accomplished without benefit of an election or *any other* clear objective manifestation that the selection of that representative reflects the wishes of a majority of the employees. Of course, at the heart of it, that is the fatal flaw in the approach endorsed by the majority. Thus, in the absence of clear evidence, they are reduced to *speculating, hypothesizing, and at the bottom, guessing about the sentiment of a majority of the employees.* For my part, speculation and guess work are no substitute for objective evidence of majority status and are simply not a proper basis for imposing on employees a bargaining agent not of their choosing." (at 141a) (emphasis supplied)

Since the mandate of the Act does not permit the imposition upon employees of a union they did not choose, the remedial authority of the Board under § 10(c) of the Act is in no way restricted by the failure of this Court to adopt the remedy of a nonmajority bargaining order.

This point was best summed up by the Circuit Court when it held:

> "Nothing now in the text of the governing statute or in its legislative history, suggests that Congress contemplated general authority in the Board to select or designate a union for employees, a majority of whom never signaled assent to the arrangement." (at 45a)

POINT III

Although the decision below conflicts with the decision of the United States Court of Appeals for the Third Circuit in *United Diary Farmers Cooperative Assn.* v. *NLRB*, 633 F.2d 1054 (3d Cir. 1980) that alone, is not sufficient grounds for this Court to grant certiorari.

It is undisputed that as a result of the Circuit Court's decisions, a conflict presently exists between the only two circuit courts to have ruled on the issue of whether the Board has statutory authority to issue a nonmajority bargaining order.[16] However, the fact that a conflict exists does not require that this Court grant certiorari.

Rule 17.1 of the Rules of the Supreme Court, sets forth the Court's considerations when determining whether to grant certiorari:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be

[16] Although the Union in its Petition (pp. 14 fn 7) seeks to convince this Court that other circuits have sanctioned nonmajority bargaining orders, the only two circuits to have confronted this issue squarely are the Third and D.C. Circuits.

> granted only when there are special and important reasons therefor."

Under Rule 17, a circuit court decision that is in conflict with existing court of appeals authority may provide a reason which the court will consider in determining whether to grant certiorari. However, the existence of a conflict is not by itself determinative. Indeed, this Court has denied certiorari in several recent cases where there was a square and irreconcilable conflict between the circuit courts. Compare, *Muley* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), with *Fields Productions Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971); see also *California Dept. of Industrial Relations* v. *Homemakers Inc.*, 423 U.S. 1063 (1976) (White and Blackman, J.J. dissenting from denial of certiorari).

In *Freeman Guardian, et al.* v. *Flake, et al.*, 405 U.S. 1032 (1972) (Douglas, J. dissenting from denial of certiorari), this Court denied certiorari despite the fact that eight circuit courts had divided evenly on the important constitutional question of public school hairstyle regulations. After analyzing these cases, one leading team of Supreme Court scholars commented:

> "the Court as a whole now seems committed to giving the existence of a conflict less than decisive weight." *Stern & Gressman*, Supreme Court Practice, § 4.1, at 269 (5th ed. 1978).

The denial of certiorari is particularly appropriate in this case. The time is not ripe for the Court to resolve this conflict since only two circuit courts have squarely addressed the issue at bar.[17] The present issue is admit-

[17] There is also evidence that the Third Circuit is in a state of confusion as to when bargaining orders, if ever, are to be granted. See *NLRB* v. *K&K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981), (Gibbons dissenting).

tedly one of great concern to the entire labor bar. However, before this Court examines the appropriateness of nonmajority bargaining orders, it should (as it has done in the past in cases involving important issues) wait for additional case law which might produce a consensus or a satisfactory majority among the circuit courts. *Id.* at 269 n. 32; *Freeman Guardian, et al.* v. *Flake, et al, supra. See also Dupuy* v. *Dupuy,* 434 U.S. 911, 912 (1977) (White, J. dissenting).

POINT IV

This Court should not grant certiorari, because in *Gourmet Foods, Inc.*, 270 NLRB No. 113 (May 18, 1984) the NLRB held that it does not have the statutory authority to issue a nonmajority bargaining order.

In conclusion, we call the Court's attention to the fact that the Union, and not the Board, has petitioned for certiorari. This is because the present Board has reevaluated its decision below and its *United Diary Farmers* decision and is now of the belief that it does not possess the authority to issue a nonmajority bargaining order and that a nonmajority bargaining order is not an appropriate remedy.

In *Gourmet Foods, Inc., supra,* the Board held:

> "Accordingly, we overrule those cases [including CONAIR] in which the Board has found that it has statutory remedial authority to issue nonmajority bargaining orders and in which the Board has exercised that authority." (at 16-17)

In light of the Board's turnaround and its decision in *Gourmet Foods,* this Court should not grant the Union's petition for a writ of certiorari. See *Woodkraft Division, Georgia Kraft Company* v. *NLRB,* No. 83-103, —— U.S. ——, 80 L.Ed.2d 149, 115 LRRM 3296 (1984).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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